It is for these reasons that we dismissed the appeal with costs and confirmed the order for re-trial before another district judge.

Appeal dismissed.

Solicitors: *Lee & Lee; Braddell Bros.*

GUAN SOON TIN MINING CO. v. WONG FOOK KUM

[F.C. — (Azmi C.J. (Malaya), Ong Hock Thye and Suffian F.JJ.) November 4, 1968]

[K.L. — Federal Court Civil Appeal No. X28 of 1968]

Negligence — Proof of — Act authorised by the Legislature — Proof of damage — Damages — Duty to mitigate.

Mining — Tailings from mine — Discharge of — Pollution of fish pond — Authorised act.

Evidence — Books of account in support of, not produced — Presumption against party not producing.

This was an appeal against the decision of the High Court in Kuala Lumpur which had awarded the respondent damages for damage alleged to have been sustained by him as the result of appellant's negligence in causing pollution of a fish pond by discharging tailings thereto from their adjacent mine. The respondent was the holder of a temporary occupation licence but this had been cancelled in October 1964. The appellants were subsequently given a licence authorising and directing them to deposit all tailings from their mine on an area which included the fish pond on the land included in the temporary occupation licence formerly granted to the respondent.

Held, allowing the appeal: (1) the learned trial judge was wrong in holding that the appellants were negligent as (a) they were doing what they were authorised to do and there was no suggestion that they could have done the authorised act in any other manner which could have prevented loss and damage to the respondent, and (b) it was not established that there was any direct or traceable relation of cause and effect between the appellants' conduct and the respondent's loss;

(2) the respondent in this case had not given sufficient evidence of the damages he suffered and moreover it was clear from the evidence that not only could the loss or damage have been mitigated but it could have been wholly avoided by timely action on his part.

Cases referred to:—

(1) *Bonham-Carter* v. *Hyde Park Hotel Ltd.* (1948), 64 T.L.R. 177 at 178.

(2) *David Geddis* v. *Proprietors of Bann Reservoir* (1878), L.R. 3 App.Cas. 430, 455.

(3) *Dunne* v. *North Western Gas Board* [1964] 2 W.L.R. 165, 181.

(4) *The Fritz Thyssen* [1967] 2 W.L.R. 919.

(5) *Bonnington Castings Ltd.* v. *Wardlaw* [1956] A.C. 613.

(6) *Granby (Marquis)* v. *Bakewell Urban District Council* (1923), 87 J.P. 105; 21 L.G.R. 329.

The following cases were also cited in argument: *Livingstone* v. *Rawyards Coal Co.* (1880), L.R. 5 App. Cas. 25, *Banco de Portugal* v. *Waterlow* [1932] A.C. 452, 475, *Monarch Steamship* v. *Karlshamns Oljefabriker* [1949] A.C. 196, 221, *Victoria Laundry* v. *Newman* [1949] 2 K.B. 528. 593, *Thomas* v. *Sorrell* (1675), Vaugh 330 at 351; 124 E.R. 1098 at 1109, *Wood* v. *Leadbitter* (1845), 13 M.&W. 838; 153 E.R. 351, *Winter Garden Theatre* v. *Millenium Production* [1947] 2 All E.R. 351, 339, *Hay or Bourhill* v. *Young* [1943] A.C. 92, 101, *Commissioner for Railways* v. *Quinlan* [1964] A.C. 1054 at 1073 1074, 1076 and 1084, *Rowley* v. *L. & N.W. Railway Co.* L.R. 8 Ex. 221, *Thompson* v. *Park* [1944] 1 K.B. 408, *Minister of Health* v. *Bellotti* [1944] 1 K.B. 298, *Australian Blue Metal Ltd.* v. *Hughes* [1963] A.C. 74, *Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Ex. 781; 156 E.R. 1047, *Mohamed* v. *Kunji Mohidin* [1967] 1 M.L.J. 96, *Julaika Bivi* v. *Mydin* [1961] M.L.J. 310, *Mohamed Said* v. *Fatimah* [1962] M.L.J. 328, *Wilson* v. *Tavener* [1901] 1 Ch. 578, *Lowe* v. *Adams* [1901] 2 Ch. 598, *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* [1955] 2 All E.R. 355, *Loh Chik San* v. *Loh Chak Wan* [1961] M.L.J. 255 *Lim Kien Mok* v. *B.H. Kevan* [1963] M.L.J. 294.

FEDERAL COURT.

Edgar Joseph Jr. with *Heng Cheng Swee* for the appellants.

Ooi Boon Leong for the respondent.

Cur. Adv. Vult.

Ong Hock Thye F.J.: In the High Court at Kuala Lumpur the respondent was awarded the sum of $12,523 and costs for damage claimed to have been sustained by him as the result of the appellants' negligence in causing pollution of a fish pond by discharging tailings thereinto from their adjacent mine. This is an appeal against such judgment.

The decision of this appeal requires little more than a brief statement of the facts. The respondent alleged that he was in business rearing fish for the market. In 1964 he was the holder of "Temporary Occupation Licence of State Land or Land Alienated for Mining Purposes". This type of licence is not valid beyond December 31 of the year of issue, unless renewed. It was in fact never renewed, but cancelled by the Collector of Land Revenue, as he was empowered to do by law, on October 23, 1964. Official notice requiring the respondent to vacate could not be served till January 11, 1965, but this was through his own fault, as he could not be found earlier. On or about October 28, 1964 the appellants were informed by letter from the collector that the respondent's licence had already been cancelled. The appellants were duly issued a licence for Hydraulic Mining on adjacent lands authorising and directing them to deposit all tailings on an area which included the pond in question, with effect from November 1, 1964. On the faith of the collector's letter the appellants, on or about November 4, commenced mining operations and it was held by the learned trial judge that, by so doing, they had been negligent because they "should have foreseen that by emptying muddy water into the pond it would affect the fish therein." At the same time it may here be mentioned that the learned trial judge was satisfied that the respondent "had knowledge, as far back as Sep-

tember 1964 that mining operations would affect his fish in the said pond," but he had done nothing whatever to avoid consequences which he must have known were inevitable, if the discharge of tailings were liable to hurt his fish as claimed.

As to damages the respondent alleged that between April 4 and October 7, 1964 he had stocked the pond five times with approximately $9,000 worth of fish fry of certain named species ordered from Hongkong through one Goh Boon Khiong, a person who had been engaged in the business for 20 years. By December the respondent said that they had attained sizes and market values varying according to the length of time they had been in the pond. He claimed for total loss thereof and testified that "from December 1964 and for a period of 20 days thereafter the fish were gradually dying off."

On December 15, he instructed his solicitors to demand $25,000 as compensation for loss to that date of fish in the pond said to be worth a total of $40,000. On December 29, 1964 he issued a writ against the appellants. In an amended statement of claim it was stated that "since the commencement of mining operations by the defendants until the date of filing of the writ fishes in the said pond to the value of about $32,500 perished as a result of such mining operations." At the trial the total amount claimed was $29,815.50 (see Ex. P.16) made up of one sum of $20,886, being his own estimate of the market value of his entire stock of fish as at the end of December 1964 (when it was said that they had all perished) added on to the sum of $8,926 representing the landed cost of the fish fry and a quantity of fish food. The learned trial judge was content to accept these figures as the basis of calculation, without further examination. After making a series of arbitrary deductions of 20, 30 and 20 per cent, for various reasons, he arrived at the sum of $12,523 as his concluded assessment of damages which he awarded the respondent.

The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne & McGregor on Damages* (12th Ed.) para 174. For its practical application I would quote Lord Goddard C.J. in *Bonham-Carter* v. *Hyde Park Hotel Ltd.*:—[1]

"Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying, 'This is what I have lost: I ask you to give me these damages.' They have to prove it."

With due respect I consider the award of damages wholly erroneous. In the first place, even if the respondent's unsupported evidence of market value in December was accepted, the claim was improperly inflated by adding to such market value the purchase price of the fry. A simple illustration will demonstrate the fallacy. Let us say that a calf was bought for $300. It was worth $1,000 as a full-grown cow when it was killed by accident. Judgment against the tortfeasor should, of course, be for $1,000 only, not $1,300. I am therefore not surprised that counsel for the respondent admitted the error when I pointed it out to him.

In the second place, the claim was for total loss as at the date of issue of the writ, December 29, 1964. This was clearly the case, according to the statement of claim and the respondent's evidence was that "from December 1 and for a period of 20 days thereafter the fish were gradually dying off." He called as his witness a neighbour, Lee Yew Hian, who said that "after the 20 odd days I did not see any dead fish." Now, according to the respondent's own figures (see Exhibit P.16) there should have been over 18,000 fish, each weighing between 1 and 2 katties, which perished during that period. Yet there was not a scrap of evidence enabling an estimate to be made of the number or weight of fish which were said to have perished. Scrutiny of the record shows that no attempt was ever made to prove a total loss or to quantify the loss. Consequently it was pure speculation for the judge to make an allowance of 20 per cent survival as he had done.

In the third place, there was no evidence whatsoever that the death of any of the fish seen floating on the surface during those three weeks was due to pollution of water by the appellants' mining operations. If the pollution was in truth the real cause of death in December 1964, it is surely logical that the continuance of mining operations thereafter must have rendered the waters of the pond progressively more unsuitable for any further pisciculture. Yet, out of the respondent's own mouth, was divulged the fact that in 1965 he had restocked these same waters with still more fish, without any evidence of detriment to such fry. The pond was in fact of an extraordinary size for this purpose, 22 acres, situate on State land to which the public had unfettered access. On that account not only was it possible and probable that the fish said to have been floating in December 1964 might have been poisoned by poachers, but there also could have been at any time "an epidemic or the water might have been polluted by numerous and diverse means", to quote the learned trial judge himself. Despite all these envisaged possibilities, none of which were ruled out, the judge, nevertheless had omitted to consider that not

an iota of evidence was produced as proof that pollution of water by mining effluvium was the true cause of disaster to the fish. To emphasise the point, I would observe that when the judge had a view of the pond on September 1, 1966, he saw "scores of dead fish floating in the pond." If nearly two years of so-called pollution still failed to exterminate all fish in those waters, was it possible to assume that there was any relation of cause and effect between the appellants' mining operations and the deaths occurring so soon after the commencement of such operations? If water pollution was to blame, as alleged, any of the dead fish seen on September 1, 1966 could have been removed for examination to ascertain the cause of death. Since the respondent's advisers failed to take such an obvious step to prove their case, if there was any truth in it, it seems to me reasonable to conclude that nobody could have thought that the fish died of the same cause as did the others in December 1964. Indeed I am struck by the curious coincidence that dead fish should have been seen again on the very date appointed by the judge for the view.

Before leaving this question I should observe that the evidence of the fisheries expert was purely hypothetical. More than that, it tended to contradict the respondent's claim. The gist of his evidence is this:—

"Technically speaking, muddy water can cause the death of fish by asphyxia, but *unless I examined specimens of dead fish and verify that the particles form a film at the gill, I cannot tell the court if it is the cause of death* . . . . If the fish were *poisoned* they would die within a period of one or two days . . . . If the discharge is *not poisonous* the fish can move to another corner . . . . It will take a few months to make the whole pond muddy. Fish would go to the other side if one side of the pond is muddy."

Of course, it was never suggested that the appellants were guilty of doing anything worse than merely raising the silt contents of the water in the pond. Such being the case, the very fact that it was considered safe, even by the respondent himself, to stock the pond again with more fish fry in 1965, ought to be proof enough that the appellants' responsibility for what happened in December 1964 was negatived, even on balance of probabilities.

I pass now to the issue of negligence, which the learned trial judge found in favour of the respondent on the following grounds:—

"It is generally accepted that if the law grants a person a licence to do an act, it does not permit the person to do the said act negligently. That person must take reasonable care to abstain from *unlawful* acts which may be expected to harm his neighbour in the widest sense of that word. The lawfulness or otherwise of such conduct will depend, for the most part, upon whether the activity which may cause damage is one which could be carried out in such a way that if the person took reasonable trouble to do so, it would not cause that damage. An act which if done in the exercise of a licence is lawful becomes unlawful *if done for the purpose of injuring one's neighbour*, since the injury is consequent neither on the exercise of a legitimate interest, nor is it one which is unavoidable even by the taking of reasonable care. In the present case there is ample evidence to show that dead fish were seen floating in the said pond from 1.12.1964 and for 20 days thereafter. An expert from the Fisheries Department, one Tan Weng Hong, asserted — and I have no reason to doubt his opinion that the onrush of polluted and muddy water from the defendant company's mine would disturb the organic silt and would cause suspension and this would remove the oxygen content of the water, thus causing the death of the fish by asphyxia. From the evidence it is clear beyond doubt that the defendant company was negligent. They should or must have foreseen that by emptying muddy water into the said pond it would affect the plaintiff's fish therein."

It is to be remembered that the appellants were not only authorised, but expressly directed, in conformity with the Mining Enactment, to discharge their tailings into the pond. In the absence of binding authority for the restatement of law to be found in the fourth sentence of the judgment quoted above, I feel I should express my respectful dissent from the view taken by the learned judge. For myself, I think the true principle of law to apply should be that stated in the House of Lords by Lord Blackburn in *David Geddis* v. *Proprietors of Bann Reservoir*:—[2]

"It is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it can be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers."

In a more recent case, *Dunne* v. *North Western Gas Board*,[3] the judgment of the Court of Appeal again was that, in like circumstances, "there would be . . . . no liability if what had been done was that which was expressly required by statute to be done or was reasonably incidental to that requirement and was done without negligence."

With respect, therefore, I am of opinion that the learned trial judge was wrong in holding that, "from the evidence," foreseeability of damage was really all that mattered. In what manner was the authorised act done negligently? On this point the judgment was silent. Yet there was no suggestion of anything done which was not wholly reasonable on the part of the appellants, no suggestion as to how they could have done an authorised act incidental to the proper conduct of mining operations in any other manner which could have prevented loss and damage to the respondent, except to desist from mining altogether. *Damnum* does not necessarily import *injuria*. Above all, is this decisive factor: it was never established, though assumed by the judge, that there was any direct or traceable relation of cause and effect between the appellants' conduct and the respondent's

loss. Without proof of damage how could the respondent have succeeded?

Before I conclude I feel that there are two further observations which ought to be made. The first relates to the infirmity of the respondent's evidence. It is my view that the admission of anonymous invoices produced by the respondent was in breach of one of the fundamental rules of evidence, namely, that in all cases the "best evidence" of which the case in its nature is susceptible must be given. Not one receipt was produced for the many payments alleged to have been made from time to time to Goh for the fry consigned from Hongkong. If receipts were thought fit to be destroyed, I cannot imagine why only invoices should have been preserved. Not only did the part payments on each consignment postulate the keeping of necessary business accounts by vendor and purchaser, but the various items charged in the invoices, apart from the fish fry, also postulated the existence of books of account. Where such books could have been, but were not, produced in support of oral testimony, it is only fair to presume that the books, if produced, would have been damaging to the party who should have produced them. It was the most obvious course, when the invoices were anonymous, for the party relying on them to produce books showing that they were derived from an account bearing truly and unmistakably the name of the respondent. If there was in existence any such account, would the respondent's solicitors have omitted to call for its production?

My second observation relates to the question of damages. The respondent had been well aware, as early as September 1964, of the appellants' intention to discharge their tailings into the pond. Hence he had had every opportunity and ample time to avoid its consequences. He was equally well aware of the tenuous nature of his right to use the pond. In the circumstances he should have acted reasonably himself and shown some concern for his own interests. Having been forewarned of what the pond was intended for, he ought to have taken notice that his licence had been, or would shortly be cancelled, since user of the pond for tailings was wholly incompatible with the continuance of his licence. Clearly, then, he could have avoided any loss whatsoever had he cared to act reasonably to spare himself the anticipated damage, instead of behaving obstinately and perversely. Such being the case, the truth is that, not only could the loss or damage have been mitigated, but it could have been wholly avoided by timely action on his own part. For the loss, if any, he had only himself to blame. On this point I consider there is good authority for me to hold that the respondent by his own conduct, had disentitled himself to any damages: see *The Fritze Thyssen*,[4] of which I need only quote the headnote:—

> "Following a collision between the *Mitera Marigo* and the *Fritz Thyssen*, the *Mitera Marigo* was severely damaged but her master refused all assistance and the vessel made her way to harbour where she sank, becoming a total loss. In an action between the respective shipowners in which liability for the collision was agreed, the question arose whether the sinking was a direct result of the collision:—
>
> **Held**, that the repeated refusal by the master of the *Mitera Marigo* of assistance was a *novus actus interveniens*, for, although a decision taken in an emergency should not be judged too harshly, on the facts the refusal was unreasonable and amounted to an omission to take the vital precautions required by good seamanship which would in all probability have prevented a total loss; and that, accordingly, the sinking was not a direct result of the collsion and the *Fritz Thyssen* was exempt from liability for it."

I would allow the appeal and set aside the order of the court below, with costs at both stages to the appellants: the deposit of $500 to be refunded also to them.

Azmi C.J. (Malaya) concurred.

Suffian F.J.: The defendant company (appellants) was interested in mining tin from Lot 3984. If granted a licence by the Mining Department, it must use the water holes nearby as tailing areas. It realised that some one (not the plaintiff) was using two of them (Lots Nos. 227 and 992) for fish-rearing. So on 1st October, 1964, it wrote to the Collector of Land Revenue, Kuala Lumpur, a letter to suggest that the Temporary Occupation Licence (T.O.L.) in respect of the two lots be cancelled.

Mr. Wong Fook Kum, the plaintiff (the respondent) reared fish in two ponds (Lots 59 and 992) in respect of which he had a T.O.L. from the collector. It had been renewed to him by the collector from year to year. The last renewal was for the year 1964. By law this T.O.L. was not valid beyond 31st December, 1964, unless further renewed. On 23rd October, 1964, the collector wrote to the plaintiff a letter cancelling the T.O.L. and asking the plaintiff to vacate the ponds forthwith. On 28th October, 1964, the collector wrote informing the defendant that he had cancelled the plaintiff's T.O.L. On 11th November, 1964, the Mines Department gave the defendant a licence under section 91 (iii) of the Mining Enactment to mine Lot 3984 on condition that all tailings be dumped into the two ponds over which the plaintiff had a T.O.L. and on to one other lot. On or about 4th November 1964, the defendant began mining operations using the ponds as its tailing area.

As it happened, the collector's letter of the 28th October, 1964, cancelling the plaintiff's T.O.L. never reached him until 11th January, 1965, when it was served on his solicitors. Whatever may have been the plaintiff's rights between 28th October, 1964, and 31st December, 1964 (when the T.O.L. would by law have expired in any event), there is no doubt that the plaintiff had no right whatsoever over the ponds on and after 1st January, 1965.

Soon after the defendant had begun mining operations, dead fish began to appear on the surface of the ponds.

The plaintiff sued the defendant.

The learned trial judge held that on or about 1st November, 1964, or soon thereafter the defendant company knew that the plaintiff was rearing fish in the ponds, the defendant company callously continued with its mining operations negligently, resulting in the killing of the plaintiff's fish and awarded the plaintiff damages in the sum of $12,523 and costs.

The defendant company appealed.

Section 134 of the Mining Enactment under which the defendant company's licence was issued provides that no licence or other authority issued under the Enactment shall exempt any person such as the defendant from liability in respect of any damage caused by him to the property of any person. The question is, assuming that there was any duty owed by the defendant to the plaintiff and there was breach of such duty, was the loss of the plaintiff's fish attributable to the defendant's negligence. Negligence alone is not sufficient to make the defendant liable; as was decided by the House of Lords in *Bonnington Castings Ltd.* v. *Wardlaw*,[5] the plaintiff must prove by the ordinary standard of proof in civil actions, at least that on a balance of probabilities the defendant's breach caused or materially contributed to the injury suffered by the plaintiff and *not merely that it was possible that the injury might have been so caused.* In a case summarised in Volume 36 of the *English and Empire Digest*, paragraph 694 at page 325, *Granby (Marquis)* v. *Bakewell Urban District Council* [6] there was positive proof that the plaintiff's fish was killed by the act of the defendant. The facts there were that in May and October, 1922, some dead fish were observed in the river Wye, Derbyshire, at a spot below that from which a drain pipe leading from certain gas-works entered the river. Samples of the effluent from this pipe were taken on each occasion, which on analysis were found to contain matter highly poisonous to fish. The owner of the fishing rights over that part of the river affected commenced an action for an injunction and damages against the owners of the gas works. It was held that on the evidence it was satisfactorily proved that the effluent from the gas works was, on each occasion, the cause of the death of the fish and accordingly the plaintiff was entitled to an injunction and damages. It is to be noted first that in that case samples of the effluent from the drain pipe was taken on each occasion and secondly the samples were analysed and were found to contain matter highly poisonous to fish. On that evidence the court held the defendant liable.

With deep respect to the learned trial judge in the instant case, I do not find here sufficient evidence entitling the court to hold that the plaintiff has by the ordinary standard of proof in civil actions shown at least that on a balance of probabilities it was the defendant's breach that caused or materially contributed to the plaintiff's injury. All that the plaintiff has merely proved is that it was *possible* that his injury might have been so caused.

The evidence allegedly connecting the defendant's negligence with the injury suffered by the plaintiff has been examined in detail by my brother Ong Hock Thye. Consequently I will content myself by saying only a few words. The plaintiff's ponds covered approximately 22 acres and at their deepest they are 50 feet deep. They are unfenced and members of the public had access to them. It is true that some time in November the defendant company began discharging muddy water from its mine into the ponds. It is true that on 1st December, 1964, dead fish appeared on the surface of the water, but there was no evidence or there was insufficient evidence to connect the death with the defendant's mining operations.

The plaintiff called Mr. Toh, a Fisheries Assistant, to give expert evidence for him. I have scrutinised his evidence and I agree with my brother Ong Hock Thye that there is nothing in it to justify the court finding that the defendant's mining operations were responsible for the dead fish. There was no positive proof, as there was in the *Granby* case, *supra*, that the discharge from the defendant's mine had anything to do with the death of the fish; there was only a possibility.

If it were true that the defendant's mining operations had been responsible for killing the plaintiff's fish, why did he in the following year put in more fish fry into the ponds (see his own evidence at page 36)? Also Mr. Chin and Mr. Tan, called for the defence, said that after the commencement of mining operations they still went fishing in the ponds and they had caught fish there — which suggests that even then there were still a lot of fish in the ponds.

In the circumstances I agree that the appeal be allowed with costs.

Appeal allowed.

Solicitors: *Heng, Chen & Co.; Ariffin & Oo.*